

PP v. ALSARIP AMBONG

HIGH COURT SABAH & SARAWAK, TAWAU
RAVINTHRAN PARAMAGURU J
[CRIMINAL SUIT NO: TWU-45-5-6-2013]
12 MAY 2014

CRIMINAL LAW: *Penal Code – Section 302 – Murder – Accused charged for murder – Whether prima facie case established – Elements of offence to be proven – Whether dying declaration of deceased admissible – Whether intention to cause death of deceased could be reasonably inferred from facts – Whether defences of self-defence, provocation or accident available to accused*

CRIMINAL LAW: *Murder – Defence – Provocation – Whether accused lost power of self-control by sudden and grave provocation – Whether incident occurring two days before murder could be relied on – Whether there was cooling off period between provocation and murder – Whether defence proven on balance of probabilities*

CRIMINAL LAW: *Murder – Defence – Defence of self-defence and sudden fight – Whether there was cooling off period – Whether defence proven on balance of probabilities – Penal Code s. 96*

CRIMINAL LAW: *Murder – Defence – Defence of accident – Accused admitted to stabbing deceased without justifying it was accident – Whether defence proven on balance of probabilities*

EVIDENCE: *Hearsay – Dying declaration – Murder – Deceased died shortly after being stabbed – Dying declaration of deceased implicating accused – Whether admissible – Evidence Act 1950 s. 32(1)(a)*

The accused was charged under s. 302 of the Penal Code for the offence of murdering his cousin by stabbing him with a knife. The key witness for the prosecution was the sister of the deceased ('PW2'). PW2 knew the accused by the nickname of 'Diki'. The accused was PW2's first cousin. The accused had come to PW2's house on the day preceding the murder and had spent a night there. The deceased was sleeping in the living room. PW2 had gone into a nearby room and the accused was standing in the living room while the deceased was still fast asleep. Moments later, PW2 heard a cry of pain from her brother. She rushed to the living room and saw the accused standing one foot away from the deceased. The accused then opened the grill door and ran out. The deceased then said 'Diki kenapa kau buat aku begini'. PW2 saw a bloodied knife in the living room. After the incident, an uncle of hers ('PW5') came to the house and told her that the accused came to see him and apologised for stabbing the deceased. The defence of the accused was that he acted in self-defence (private defence) under s. 96 of the Penal Code. He claimed that he had an argument with the deceased while watching television. The accused had accused the deceased of having an affair with his wife and called the deceased ('binatang'). According to the accused, the deceased got angry and fetched a knife from the kitchen and attempted to stab him with the knife. The accused

- A tried to the snatch the knife by pushing the deceased backwards but the deceased lunged at him. The accused claimed that he was defending himself when the deceased got stabbed.

Held (convicting and sentencing accused to death):

- B (1) In order for the court to make a finding that a *prima facie* case had been made out, the prosecution had to adduce credible evidence in respect of the following essential elements: (i) that the deceased died of the two stab wounds inflicted on him; (ii) that the accused had inflicted the said wounds on the deceased with a knife; and (iii) that the act of the accused in inflicting the stab wounds came within the ambit of any one of the four circumstances enumerated in s. 300(a) to (d) of the Penal Code.
- C (para 15)
- D (2) There was no doubt in respect of the identity of the deceased. The prosecution had proved that the deceased died as a result of the two stab wounds that were inflicted on his left chest. The evidence to support the crucial element of the offence that the accused stabbed the deceased came from PW2. PW2 did not actually see the accused stabbing the deceased. However, the inferential evidence irresistibly pointed to the conclusion that it was the accused and no other person that had stabbed the deceased twice in the chest on that fateful morning. (paras 17, 19 & 20)
- E (3) PW2's evidence was corroborated by PW5. The other piece of highly incriminating evidence that corroborated the testimony of PW2 was the dying declaration of the deceased to the effect that the accused had done him in. The utterance of the deceased 'Diki kenapa kau buat aku begini' was admissible under s. 32(1)(a) of the Evidence Act 1950 as the deceased died shortly after being stabbed. The last utterance of the deceased blamed the accused as his assailant. All the circumstantial evidence, if considered cumulatively, also led to the irresistible inference that it was the accused who had stabbed the deceased twice in the chest. (paras 23 & 25)
- F (4) Intention is a matter of inference. There was beyond reasonable doubt evidence to infer that the act of killing of the deceased by the accused fell under all the four limbs of s. 300 of the Penal Code. A reasonable inference could be drawn that the accused intended to cause the death of the deceased or at the very least that he had knowledge that wounds he inflicted would cause death in the ordinary cause of nature. (paras 28 & 29)
- G (5) The evidence of the accused was not believable. The claim of the accused that he acted in self-defence had not been proven on a balance of probabilities. (paras 40 & 47)
- H I

- (6) The accused never said in his evidence that he lost the power of self-control by sudden and grave provocation. The accused also could not have been provoked because the argument that the accused had with his wife about the gossip of the villagers that the deceased had an affair with her since this occurred two days before the incident and there was a considerable cooling off period. (para 49) A
- (7) There was no evidence from the accused to suggest that the defence of accident was available to him. The accused did not say in court that when he pushed the deceased away from him twice, the deceased was stabbed accidentally. In fact, the accused admitted stabbing the deceased to PW5 without justifying that it was an accident. (para 55) B

Case(s) referred to:

Balachandran v. PP [2005] 1 CLJ 85 FC (*refd*)
Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC (*refd*)
Hashim Mat Isa v. PP [1950] 1 LNS 23 HC (*refd*)
Kenneth Fook Mun Lee v. PP [2006] 4 CLJ 359 FC (*refd*) D
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC (*refd*)
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC (*refd*)
PP v. Ngoi Ming Sean [1981] CLJ 93; [1981] CLJ (Rep) 251 HC (*refd*)

Legislation referred to:

Criminal Procedure Code, ss. 180, 277 E
 Evidence Act 1950, ss. 32(1)(a), 105, 114(g)
 Penal Code, ss. 80, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 299, 300(a), (b), (c), (d), 304(a)

For the prosecution - Hamdan Hamzah; DPP

For the defendant - Wilson Chang (CC Liew with him); M/s Wilson Chang & Partners F

Reported by Amutha Suppayah

JUDGMENT

Ravinthran Paramaguru J: G

Introduction

[1] The accused was charged with murdering his cousin by stabbing him with a knife. The charge read as follows:

That you on the 8th day of November 2011 at about 9.30 am at House No. 161, Jambatan No. 3, Miles 4 in the district of Tawau, in the State of Sabah, did commit murder by causing the death of one Muslim Bin Sammah and that you have thereby committed an offence punishable under section 302 of the Penal Code (Act 574). H

[2] The accused was assigned a court appointed defence counsel ie, Mr Wilson Chang. He claimed trial to the charge. During the trial, another defence counsel, Mr CC Liew assisted Mr Wilson Chang. I

A Summary Of Case For The Prosecution

[3] The prosecution called a total of 13 witnesses to prove its case. All the crucial witnesses, the deceased and the accused are of Filipino origin and are related to each other. All of them live in a water village at Mile 4, Tawau. The deceased is one Muslim bin Sammah who is 30 years old. His own cousin has been charged with his murder. The summary of the evidence of the crucial witnesses are as follows.

[4] The star witness for the prosecution is Saliha bin Sammah (PW2). She is the sister of the deceased. She lived in a wooden house with the address of No. 161, Jambatan Cempaka, Batu 4, Kg. Hidayat Jalan Apas Tawau. Her husband, her children, her parents, the deceased and the deceased's wife also resided in the same house. The deceased whose nickname was "Kuang" worked as a carpenter. He built boats. PW2 knew the accused by the nickname of "Diki". The accused is PW2's first cousin as their fathers are brothers. The accused lived with his wife and parents in law in another district, ie, in Kampung Desa Bajau in Lahad Datu District. However, the house of the accused's father was only 20 minutes walk away from PW2's house. PW2 said that the incident which resulted in the death of her brother occurred on the morning of 8 November 2011. The accused had come to her house the preceding day and had spent a night there. PW2 went to the living room to put clothes on her children after having given them a bath. The shirtless deceased was still sleeping in the living room but the accused was awake that time. The accused asked PW2 why the deceased was still asleep. PW2 told the accused that it was the habit of the deceased to wake up early for breakfast and go back to sleep again. She then went into the nearby room which was about 30 feet away with her children. At that time the accused was standing in the living room while the deceased was still fast asleep. Moments later which she described as "selangkah kemudian", she heard a cry of pain from her brother. She rushed to the living room and saw the accused standing one foot away from the deceased. The accused then opened the grill door and ran out. The deceased then said "Diki kenapa kau buat aku begini". He then leaned against the door in pain. PW2 then screamed for assistance. Some of her neighbours assisted to push the deceased in a wheel barrow along the wooden bridge that connects the houses in the water village to be taken to the hospital. PW2 did not accompany him to the hospital but returned to her house. She then saw a bloodied knife in the living room which she recognized as a knife from her own kitchen. She had last used it two days before the incident to open a milk can. She had then placed it under the water container. After the incident, an uncle of hers by the name of Talib (PW5) came to the house and told her that the accused came to see him and apologized for stabbing the deceased. She told the police who came to her house later that the accused was still in PW5's house. She was later told that the police arrested the accused.

[5] The second crucial witness was PW5. He is related by marriage to the father of the accused. He lived at No. 140, Jambatan Cempaka Kg Air, Batu 4, Kg. Hidayat, Jalan Apas Tawau which is a short distance away from the house of PW2. He said that on the day in question, he was resting in his house when the accused came in and apologized for having stabbed the deceased. When PW5 inquired as to the reason, the accused told him that the deceased had gone to his house (Si Kuang naik ke atas rumah). PW5 then told the accused that he is going out for a short while and he promptly called the police who arrested the accused. During cross examination, PW5 denied that the accused told him that he was attacked by the deceased. He also denied that the accused told him that he was defending himself from being attacked by the deceased.

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[6] The investigating officer of the case is DSP Daniel Benjamin. He told the court that upon arrival at the scene of crime, he drew a sketch plan of the crime scene and directed that photographs be taken. He later sent the knife and blood samples collected from the crime scene as well as the clothes of the deceased and the accused to the Chemistry Department for blood screening and DNA profile matching. After the post mortem, he also sent blood and tissue samples taken from the deceased to the Chemistry Department for analysis and DNA profile matching. During cross-examination, it was put to the investigating officer by counsel for accused that the villagers knew about the affair between the deceased and the wife of the accused. However, the investigating officer had no knowledge of the alleged affair.

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[7] The evidence of the pathologist is as follows. The pathologist (Dr Jessie Hui, PW12) conducted a post mortem examination on the deceased. The request for post mortem was made by DSP Daniel Benjamin who is the investigating officer of the case. The body of the deceased was identified by his father (Sammah bin Samad). Dr Jessie Hui was assisted by Dr Norhidayah Binti Mohd Shafie who had earlier attended to the deceased when he was brought to the Accident and Emergency Unit of the Tawau Hospital. Dr Norhidayah told her that the deceased was bleeding from two stab wounds to the chest when brought to the hospital. His pressure was initially stable but his condition progressively deteriorated. The deceased went into cardiac arrest and died on the same day at 1.25pm before emergency surgery could be performed. Upon external examination, Dr Jessie Hui found two stab wounds on the left chest of the deceased. Internal examination revealed that the covering of the heart and blood vessels were damaged. She opined that the two stab wounds would have caused death in the normal course of nature.

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[8] The evidence of the Chemistry Department witnesses is as follows. Abdul Razak bin Mohd Iman (PW6) who is a chemist at the Chemistry Department tested all the forensic samples collected by the police for presence of blood. The samples that contained blood were sent to the DNA

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- A laboratory of the Chemistry Department which is located in Kuching. Rita Tie Ung Hwa who is a scientific officer with the Chemistry Department subjected all the samples to DNA analysis and profile matching. Her findings are contained in her report. The DNA profile developed from the blood recovered at the crime scene matched that of the deceased. The blood found on the clothes of the deceased matched that of the deceased. However, her findings also revealed that a DNA profile developed from a blood stain that was found on the trousers of the accused matched the DNA profile of the accused. Counsel for accused later submitted that this finding indicated that the accused sustained a defensive wound.

C **Test Of *Prima Facie* Case?**

- [9] At the conclusion of the case for the prosecution, the learned DPP submitted that the prosecution had made out a *prima facie* case and that the defence must be called. Counsel for accused, on the other hand, submitted that the prosecution had failed to do so. I shall first direct myself on the law in respect the test of *prima facie* case. The test of a *prima facie* case is whether the prosecution had adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction (s. 180 of the Criminal Procedure Code). In the case of *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457, the test of a *prima facie* case is stated as follows:

- E ... ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that question is “Yes”, then a *prima facie* case has been made out and the defence should be called. If the answer is “No” then, a *prima facie* case has not been made out and the accused should be acquitted.

[10] In the case of *Balachandran v. PP* [2005] 1 CLJ 85; [2005] 2 MLJ 301, the Federal Court cited *Mozley and Whiteley’s Law Dictionary* 11th edn which defined ‘*prima facie* case’ as follows:

- G A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.

- H [11] The Federal Court then explained the duty of the court at the end of the case of the prosecution as follows:

- I The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a *prima facie* case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake

a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established. A

[12] This means that the court must carry out a maximum evaluation of the evidence of the prosecution and must be prepared to convict the accused if he remained silent. With the above directions in mind, I shall now consider the elements that the prosecution must prove to establish a *prima facie* case. B

Murder

[13] The elements of the offence of murder are found in ss. 299 and 300 of the Penal Code. Section 299 defines culpable homicide as follows: C

Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

[14] Section 300 reads as follows: D

Except in the cases hereinafter excepted, culpable homicide is murder-

- (a) if the act by which the death is caused is done with the intention of causing death;
- (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; E
- (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or F
- (d) if the person committing the act knows that it is imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid. G

[15] In order for the court to make a finding that a *prima facie* case has been made out, the prosecution must adduce credible evidence in respect of the following essential elements:

- (i) That the deceased died of the two stab wounds inflicted on him;
- (ii) That the accused had inflicted the said wounds on the deceased with a knife; and H
- (iii) That the act of the accused in inflicting the stab wounds came within the ambit of any one the four circumstances enumerated in s. 300(a) - (d) of the Penal Code I

[16] I shall now consider whether the prosecution had adduced credible evidence in respect of the above essential elements.

A *That The Deceased Died Of The Two Stab Wounds Inflicted On Him*

[17] There is no doubt in respect of the identity of the deceased. He was identified by his father (Sammah bin Samad) before the commencement of the post mortem examination. Furthermore, Dr Norhidayah Binti Mohd Shafie who attended to the deceased when he was first brought to the hospital assisted the pathologist, Dr Jessie Hui to conduct the post mortem examination. Dr Jessie Hui found a number of injuries on the deceased but she was certain that the two stab wounds on the chest caused his death. She described the damage occasioned by the stab wounds as follows:

C Q: Please inform the Court about your post mortem on the deceased corpus.

D A: I conducted external and internal examination. On the external examination there were 2 stab wounds on the front of the left chest. Internally 1 of the stab wound cut the covering of the heart, the interventricular septum and one of the blood vessels supplying the heart. The other stab wound injured the left lung, the covering of the heart, the interventricular septum, one of the blood vessels supplying the heart and left chamber of the heart. These injuries caused the left lung to be collapsed and bleeding into the covering of the heart and the left chest cavity. All the other organs were pale. These findings I have I put in my Post Mortem Report.

E [18] Dr Jessie Hui opined that a sharp weapon such as a knife could have caused the stab wounds on the left chest of the deceased:

Q: From your examination what might be the weapon used to cause the injuries sustained by the deceased?

F A: A sharp object with one sharp edge and one blunt edge. The tip of the weapon has to be sharp as well to be able to stab eg, a knife.

[19] Based on the evidence of Dr. Jessie Hui, the prosecution has proved that the deceased died as a result of the two stab wounds that were inflicted on his left chest.

G *That The Accused Had Inflicted The Said Stab Wounds*

[20] The evidence to support the crucial element of the offence that the accused stabbed the deceased came from PW2. I have summarised her evidence earlier and as can be noted, PW2 did not actually see the accused stabbing the deceased. However, the inferential evidence irresistibly points to the conclusion that it was the accused and no other person had stabbed the deceased twice in the chest on that fateful morning. PW2 told the court that she came to the living room to dress up her children. The deceased who is her brother was lying down in the living room. Apart from her, the deceased and her children, the only other person who present was the accused. The accused is her first cousin therefore his identity is not in doubt. After a brief conversation with the accused, PW2 retired to her room with her children

and thus left the sarong clad sleeping deceased alone with the accused. During the *locus in quo*, I ascertained that the sketch plan was more or less accurate except that there was no door separating the PW2's room from the living room. The room was only about 30 feet away from the living room. Now just as PW2 stepped into her room, she heard her brother scream. She turned her gaze towards the living room and saw her brother standing one foot away from the accused. She then saw the accused opening the grill door and running away. The part of her testimony that described this scene is as follows:

Q: Bila kamu dengar abang kamu menjerit 'aarghh', apa yang kamu lakukan seterusnya?

A: Saya keluar dari bilik dan tengok abang saya berdiri dan si Diki disebelah abang saya lebih kurang 1 kaki berdiri juga. Saya nampak si Diki buka gril lari keluar. Abang saya berdiri disitu. Selepas itu saya dengar dia menjerit 'Diki kenapa kau buat aku begini'. Itu saja yang saya dengar dan si Diki terus lari ke hujung. Selepas itu abang saya macam menahan kesakitan, bersandar dipintu rumah dengan perlahan-lahan dia duduk balik ditempat yang dia baring.

[21] During cross-examination, PW2 remained unshaken in respect of her testimony that her brother was sleeping when she left him and went to her room. Counsel for accused also put to PW2 that the accused and the deceased had an argument and that she could hear the deceased abusing the accused. PW2 firmly denied the suggestion because the deceased was asleep and she even heard him snoring. For the same reason, she also denied the suggestion that the deceased went to the kitchen to grab a knife and attacked the accused who defended himself. PW2 also told the court, and to my mind very credibly, that if the accused and deceased had an argument, she would have heard their raised voices. She did not hear any raised voices except a cry of pain from the deceased. In my opinion, the evidence of PW2 supports the irresistible inference that the accused had stabbed the deceased. PW2 had said that there was nobody in the living room at that time except the deceased and the accused. She had just walked to her room which was only a very short distance away when she heard her brother screaming in pain. She found her brother slumping in pain and at the same time the accused ran away. I find that PW2 is a credible witness. Her evidence has, in the main, been consistent. Although the deceased is her brother, the accused is also a close relative. There is no evidence that she harboured any grudges against him.

[22] Counsel for the accused did not put to PW2 that was the case either. In fact, PW2 and her family had accorded hospitality to the accused.

[23] PW2's evidence is also corroborated by PW5 who is related by marriage to the accused. PW5 told the court that the accused came to his house that morning and confessed to stabbing the deceased and asked for forgiveness. This is what PW5 told the court:

- A Q: Kamu tahu apa yang berlaku pada seorang yang bernama Muslim bin Sammah?
A: Saya baru sedar si Muslim di bunuh.
Q: Bila yang kamu tahu si Muslim dibunuh?
- B A: Sewaktu Diki beritahu saya.
Q: Boleh beritahu Mahkamah bagaimana kejadian yang kamu tahu si Diki membunuh si Muslim?
A: Diki datang ke rumah saya meminta ampun. Saya tanya dia 'kenapa kau minta ampun dengan aku'. Dia beritahu bahawa dia telah tikam si Kuang.
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[24] In my opinion, PW5 is a credible witness. He is an elder of the family of both the deceased and the accused. There is no evidence that he has an axe to grind against the accused. In fact, it must be presumed that the accused respected and trusted PW5 as he had gone to his house to apologize for stabbing the deceased.

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- [25] The other piece of highly incriminating evidence that corroborates the testimony of the PW2 is the dying declaration of the deceased to the effect that accused had done him in. The deceased was heard by PW2 uttering the words "Diki kenapa kau buat aku begini" which means "Diki, why did you do this to me". The utterance of the deceased is admissible under s. 32(1)(a) of the Evidence Act 1950 as the deceased died shortly after being stabbed. It is obvious that the last utterance of the deceased blames the accused as his assailant. This is because the deceased was alone with the accused that time and the accused was seen running away by PW2. The deceased was then collapsing in pain from horrific stab wounds to his chest. It is also in evidence that "Diki" is the family nickname for the accused person. PW2 also repeated verbatim the words uttered by the deceased without attempting any summary. In the premises, the last utterance of the deceased qualifies as a dying declaration under s. 32(1)(a) of the Evidence Act 1950. Although the dying declaration of the deceased is not tested by cross-examination, in my view, it has high probative value. PW2 testified that the accused had come to their family house a day earlier. It is obvious that the deceased was reasonably well disposed towards the accused. The deceased and his family had allowed the accused to stay in their house. They slept in the same room together. In fact the deceased had given his clothes to the accused the day earlier. This is because the accused came to his house wearing wet clothes as he had jumped into the sea after argument with his wife. Therefore, there is no reason why the deceased would suddenly want to untruthfully blame the accused for stabbing him.
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- I [26] Finally, counsel for the accused never put to the PW2 and PW5 that the accused did not stab the deceased. He only put to them the defence of private defence. For all the above reasons, I find that the above

circumstantial evidence, if considered cumulatively, leads to the irresistible inference that it was the accused who had stabbed the deceased twice in the chest.

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That The Act Of Stabbing The Deceased Amounted To Murder

[27] The evidence tendered by the prosecution to prove that the accused stabbed the deceased twice in the chest is not sufficient. In *Hashim Mat Isa v. PP* [1950] 1 LNS 23; [1950] MLJ 94, Willan CJ said as follows:

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A bare killing, without proof of intention or knowledge as required by that section, can never be murder. It is not sufficient for the prosecution to prove merely the killing, without proving intention or knowledge as required by that section set out in that definition.

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[28] Intention is a matter of inference. In my opinion, there is beyond reasonable doubt evidence to infer that the act of killing of the deceased by the accused fell under all the four limbs of s. 300 of the Penal Code. Dr. Jessie Hui, the forensic pathologist, virtually ruled out chances of survival from the said stab wounds. She said as follows:

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Q: What was the chance of survival of the deceased in this case?

A: Injury involving the left side of the heart and one the blood vessels supplying the heart has high mortality rate despite medical intervention.

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[29] She further opined that the two stab wounds would cause death in the ordinary cause of nature. It is common knowledge that the human heart is on the left side of the chest. The injuries inflicted on the left chest of the deceased are deep incised wounds measuring 9cm that cut the covering of the heart and vessels that supply it. In the premises, a reasonable inference can be drawn that the accused intended to cause the death of the deceased or at the very least that he had knowledge that wounds he inflicted would cause death in the ordinary cause of nature. Alternatively, the accused should have known that stabbing the deceased twice with a sharp knife on the part of the body where the heart is located is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death. Furthermore, there is no evidence at the close of the prosecution's case that the accused had any justification to cause to inflict the fatal injuries in question. PW2 denied during cross-examination that the accused was defending himself from an attack by the deceased. She did not hear them arguing either. PW5 denied during cross-examination that the accused told him that he was attacked by the deceased and that he was defending himself. PW5 agreed he saw some blood on the right palm of the accused but there is no evidence that it was a defensive wound.

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[30] In conclusion, for the reasons given above, I was satisfied that the prosecution had established a *prima facie* case against the accused on the charge of murder and I called for his defence.

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A The Defence

[31] The accused elected to give sworn testimony and did not call any other witness on his behalf. His defence is that he acted in self defence or what is termed as private defence under s. 96 of the Penal Code. The accused said that the incident where the deceased died of stab wounds took place on the third day of Hari Raya. He had come to the house of his cousin, the deceased, on the morning of the second day of Hari Raya at 6am. The accused ordinarily resides in Lahad Datu but for the last ten days before the incident in question he and his wife stayed in his father's house which was about 20 minutes walk from the house of the deceased. On the second day of Hari Raya, the accused and his wife had an argument at around 2am. The accused suspected that his wife was having an affair with the deceased. The accused slapped his wife during the argument. His father then slapped the accused. The accused then ran away from his father's house and jumped into the sea. He made his way to the house of the deceased which was nearby. The accused spent the night in the house of the deceased. The next morning, he had an argument with the deceased while watching television. The accused blamed the deceased of having an affair with his wife. He then called the deceased an animal (binatang). The deceased got angry and fetched a knife from the kitchen. The deceased then attempted to stab him with the knife. The accused tried to the snatch the knife by pushing the deceased backwards. However, the deceased lunged at him again twice. On the third occasion, the knife slipped away from the hand of the deceased and fell on the floor. During the struggle, the accused suffered a cut on the palm of his right hand. This part of his evidence is as follows:

F Q: Kamu bertengkar berkenaan apa?

A: Saya tanya dia 'Kuang betul kah cakap orang bahawa kau kacau bini saya?' dia bilang 'ada kau nampak'. Saya cakap 'tidak ada saya nampak tapi orang cakap sama saya bahawa kau kacau bini saya'.

Q: Apa kamu cakap?

G A: Terus dia berdiri pergi dapur. Langsung dia datang terus ditikamnya aku. Saya mempertahankan diri. Selepas itu dia tolak, dia tolak lagi balik. Sampai dia tolak keduanya, saya tolak dia balik sampai kami berdiri sudah.

Q: Ada kamu luka?

H A: Ada ditapak tangan (witness points to his right hand palm).

Q: Ada berdarah?

A: Ada.

I [32] The accused said he was defending himself when the deceased got stabbed. He said as follows:

Q: Apa kamu buat?

A: Saya mempertahankan diri, saya mahu merampas pisau.

Q: Macamana si mati kena tikam di dada? Boleh jelaskan?

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A: Sebab saya rebut pisau itu jadi simati tolak saya dan saya tolak balik dia. Simati tolak lagi dan saya tolak balik dia.

[33] The accused then ran out of the living room towards the walkway outside. However, the deceased attempted to chase him. The accused ran to the house of his uncle, ie, PW5. The accused told PW5 that he wanted to apologize for fighting with the deceased. He said as follows:

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Q: Apabila kamu sampai rumah Talib, apa kamu beritahu Encik Talib?

A: Saya bilang sama dia, 'aku minta maaf kerana saya bergaduh sama si Kuang dan aku kena tikam' jadi dia bilang 'kenapa kamu bergaduh' dan saya bilang 'dia kacau bini saya'. Pakcik Talib bilang 'kau duduk saja didapur sana'.

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[34] During cross-examination, the accused said that the reason he went to PW5's house was to ask PW5 to pacify the deceased whom he thought was pursuing him. He also said PW5 saw the bleeding wound on his palm.

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Whether Self Defence?

[35] I bear in mind that it is the duty of the court at the end of the case for the defence to consider all the evidence adduced before it and consider whether the prosecution has proved its case beyond reasonable doubt. In *Dato' Mokhtar Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101; [1983] 2 MLJ 232, the Federal Court said as follows in respect of the "doubt" that will warrant an acquittal:

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To warrant an acquittal however the doubt created must not merely be a fleeting doubt or a capricious doubt but a doubt in respect of which a substantial reason can be given. The question to ask now is - has the defence evidence created a reasonable doubt on the truth of the prosecution story? (emphasis added)

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[36] In the instant case, the accused had given sworn testimony in his defence. The accused did not specifically say that he stabbed the deceased twice in the chest. But his testimony in court leaves no doubt that he caused the death of the deceased. When questioned by his own counsel how the accused got stabbed, the accused told the court that the deceased lunged towards him with a kitchen knife and that he pushed the deceased back twice. He said as follows:

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Q: Macamana si mati kena tikam di dada? Boleh jelaskan?

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A: Sebab saya rebut pisau itu jadi simati tolak saya dan saya tolak balik dia. Simati tolak lagi dan saya tolak balik dia.

[37] The defence that is raised by the accused in his testimony is self defence which falls under the general exception of private defence in Chapter IV the Penal Code. The right of private defence is provided in ss. 96 to 106 of the Penal Code. If the defence of private defence under Chapter IV is successful, the accused is entitled to an acquittal. Section 96 enacts generally

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- A that nothing is an offence which is done in the exercise of the right of private defence. The right of private defence also extends to protection of body and property under s. 97. However, the right of private defence is not absolute as s. 99 of the Penal Code has placed some limitations to prevent abuse. For example the right of private defence in no case extends to the inflicting of
- B more harm than it is necessary to inflict for the purpose of defence. As to the extent of the right of private defence, s. 100 provides that the right to private defence extends to the voluntary causing death of the assailant if there is a reasonable apprehension that death will be otherwise the consequence of the assault. In *PP v. Ngoi Ming Sean* [1981] CLJ 93; [1981] CLJ (Rep) 251; [1982] 1 MLJ 24, Ajaib Singh J summarised the provisions dealing with the
- C right of private defence as follows:

- D The Code provides that nothing is an offence which is done in the exercise of the right of private defence of a person's body. But there is no such right where the person has time to seek the protection of the public authorities. Nor will this right of private defence extend to the inflicting of more harm than is necessary for the purpose of defence. Subject to these limitations the right of private defence of the body extends even to the voluntary causing of death or any other harm to the assailant if the person who exercises his right of private defence is under a reasonable apprehension that death or grievous hurt would be caused
- E to him by the assailant. The right of private defence commences as soon as there is reasonable apprehension of danger to the body and this right continues so long as such apprehension of danger continues (see ss. 96 to 102 of the Code). And it goes without saying that the right of private defence ceases and is not available when there is no more apprehension of danger to the body.

- F [38] However, the burden of proof that an act was in the exercise of a right of private defence is on the accused as s. 105 of the Evidence Act 1950 provides as follows:

- G When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of those circumstances.

- H [39] The accused must establish it on a balance of probabilities. However, if there is reasonable doubt whether he had acted in self defence or otherwise, I should give him the benefit of doubt and record an acquittal.

- I [40] The accused told the court that the deceased got furious with him when the accused charged him with having an affair with his wife. The deceased then grabbed a knife from the kitchen and lunged at him twice. On both occasions, the accused managed to push back the deceased. It was implied in his evidence that the deceased got stabbed in the process. However, I find that the evidence of the accused is not believable for the following reasons.

PW2 told the court that she had left the sleeping deceased and the accused in the living room only for a short moment when she went to her room. From the position of the kitchen and the room in the sketch plan, it can be noted that from her room she would have seen the deceased if he walked to the kitchen. I also established from my view of the place that there is no door between the living room and the room of PW2. Furthermore, the accused told the court that there was an altercation lasting for five minutes between him and the deceased. The room of PW2 was only about 30 feet away and therefore she surely would have heard her brother and cousin arguing. She told the court during cross-examination that she did not hear any argument between them. Her evidence on this point was firm:

Q: Saya katakan kepada kamu, apabila kamu berada didalam bilik kamu ada juga keributan (commotion) ditempat abang kamu dan Diki.

A: Tiada dengar.

[41] The only sound she heard was the cry of pain of her brother upon being stabbed. Furthermore, she was emphatic that there could not have been any argument between her brother and the accused because she had stepped into her room for a moment only after leaving the accused and deceased alone in the living room. There is no reason for me to disbelieve her. She was never shaken in cross-examination. Like other members of her family, she had extended hospitality to the accused who is her cousin. Counsel for the accused suggested there was discrepancy in her evidence because she said that when she heard the deceased screaming in pain, she saw him standing beside the living room with the accused. She did not see the accused holding a knife. Counsel for the accused said that if the deceased was asleep when he was stabbed she would have seen accused holding the knife. I see no discrepancy in the evidence of PW2 on this point. Obviously, when the deceased was stabbed twice in the chest and cried out in pain he had woken up from sleep. The deceased could have stood up as well as he did not die on the spot from his mortal injuries. As for the knife, as the handle broke, it had slipped to the floor. That was the very probable reason PW2 did not see the accused holding it. Furthermore, the evidence of PW5 who is an uncle to both PW2 and the accused, provides strong corroborative evidence that she was telling the truth. The first person that the accused met after stabbing the deceased was PW5. However, he did not tell PW5 that he was acting in self defence when he stabbed the deceased. If it was true that the accused acted in self defence when he stabbed the deceased, it would have been logical and natural for the accused to say so to his uncle as he had gone to his house to seek protection. Instead, he merely asked for forgiveness for stabbing the deceased. PW5 said as follows when counsel for the accused put to him during cross-examination that the deceased told him that he was defending himself:

Q: Saya katakan kepada kamu apabila Diki pergi ke rumah kamu pada hari kejadian, dia ada memberitahu kamu bahawa dia telah diserang oleh Kuang dengan pisau.

A A: Tidak ada.

Q: Dia juga memberitahu kamu dia terpaksa mempertahankan diri?

A: Tidak ada.

B [42] Despite repeated questioning, PW5 insisted that the accused never told him that he was acting in self defence when he stabbed the deceased. There is no suggestion from the accused or his counsel that PW5 was deliberately and purposely lying about this crucial point. There is no evidence from the accused either to the effect that he was on bad terms with his uncle to the extent that his uncle would perjure himself to deprive him of a valid defence.

C [43] Counsel for the accused submitted that the accused could not have discovered the knife unless the deceased had taken it out of the kitchen. The reason is that it was the first time the accused spent the night in the house of his cousins. PW2 told the court that she left the knife below the water container. However, the evidence that the accused had been to the house on five separate occasions was unchallenged. In the premises, it can be inferred that the accused knew where the kitchen was located and therefore knew where to look for a knife.

E [44] The DNA report revealed that the accused's blood was found on his pants. The accused told the court that he suffered a wound on his hand. PW5 also said that there was blood on the hand of the accused. Counsel for the accused submitted that the wound on the palm of the accused is a defensive wound which corroborates the version of the accused that he was acting in self defence. However, in my opinion, the wound that occasioned a blood stain on the pants of the accused is not necessarily a defensive wound. My reasons are as follows. At the time of the trial, which is about two years after the incident, there is no evidence that accused suffered any serious injury to his hand. The investigating officer sent the accused upon arrest to the hospital for blood sample and nail clippings to be collected. However, investigating officer did not say that he noticed any defensive wounds on the accused.

F Counsel for the accused did not put to the investigating officer that the accused was injured either. The hospital did not prepare any medical report on the accused either. It must be presumed that in the normal course of things, if the accused was badly injured he would have been given medical attention at the hospital. Therefore the only inference that can be drawn is that the accused suffered minor injury to his palm as he held the knife and stabbed the deceased with great force. The medical report states that the estimated depth of each of the two stab wounds was nine centimetres. It is a fact that the handle of the knife came off and was found detached from the blade. It is highly probable that the act of stabbing the deceased twice with force caused the handle to break and result in minor injury to the palm of the accused. If it were a defensive wound as suggested by the counsel for the

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accused, the injuries that the accused suffered would have been far more serious and would have attracted the attention of the police officers who arrested him and the medical personnel who attended to him at the hospital when his blood specimen and nail clippings were taken.

[45] Counsel for the accused also submitted that adverse inference should be drawn against the prosecution for not adducing evidence in respect of the fingerprints on the broken handle of the knife. He said if the fingerprints of the deceased were found on the knife handle, it would have proved that he was “the initial attacker”. The investigating officer did not say that any attempt was made to lift fingerprints from the handle of the knife. Counsel for the accused did not question the investigating officer why no attempt to lift fingerprints was done. In *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492, Mohamed Azmi SCJ said as follows in respect of the scope of s. 114(g) of the Evidence Act 1950:

It is essential to appreciate the scope of section 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.

[46] In the premises, as the police were not in possession of any fingerprint evidence, I think that it is useless to speculate what they would have revealed. Adverse inference should only be raised in cases where there is suppression of relevant evidence already in the hands of the police. In this case, as no fingerprint evidence was obtained, the submission of counsel for the accused has no merit.

[47] For all the reasons given above, I find that the claim of the accused that he acted in self defence has not been proved on a balance of probabilities. I also find that the claim of self defence does not raise any doubt on the case for the prosecution. It appears to be a recent invention as the accused never related it to PW5 who was the first person he met after the incident. Furthermore, the evidence of PW2 who has nothing to gain from lying negates the possibility that the accused acted in self defence.

[48] It is not the duty of the court to consider probable defences that had not been raised (see *Kenneth Fook Mun Lee v. PP* [2006] 4 CLJ 359). However, I shall consider here briefly whether the accused could have relied on other probable defences apart from private defence on the evidence adduced in this case. The accused told the court that he suspected that the deceased had an affair with his wife. That was the reason he asked the deceased that morning whether the allegation was true. The accused then called the deceased “binatang” (animal). A successful defence of grave and

A sudden provocation can reduce the charge of murder to one of culpable homicide under s. 304 (a) of the Penal Code. Exception 1 to s. 300 of the Penal Code which is under the category of “special exception” reads as follows:

B Culpable homicide is not murder if the offender whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.

[49] However, the accused never said in his evidence that he lost the power of self control by sudden and grave provocation. In fact, the accused did not even say that he was provoked that morning. According to the accused, it was the deceased who allegedly lost his temper and went to the kitchen to get a knife. I have also considered whether the accused could have been provoked because of the argument that the accused had with his wife about the gossip of the villagers that the deceased had an affair with her. I find that this is not possible as this occurred two days before the incident and there was a considerable cooling off period.

[50] Furthermore, the deceased was not present when the accused had the argument with his wife and therefore could not have given the provocation as required by Exception 1 to s. 300.

E [51] Since the defence of the accused was self defence, I have also considered whether the act of the accused fell under Exception 4 to s. 300 or other words whether the deceased was stabbed in a “sudden fight”. Exception 4 reads as follows:

F Exception 4--Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.

G Explanation--It is immaterial in such cases which party offers the provocation or commits the first assault.

H [52] In my view, Exception 4 does not does apply as there is no evidence of a sudden fight between the accused and deceased. PW2 testified that the deceased was asleep when she walked to her room. Only moments later, she heard the deceased crying out in pain. She was firm in her testimony that there was no quarrel between the accused and deceased as she would have heard them. Before she left the room, she even heard her brother snoring.

[53] During the cross-examination of the investigating officer, counsel for the accused put the following question to him:

I Put: That during the process of self defence, he accidentally stabbed the deceased.

A: No, the deceased was sleeping.
(emphasis added)

[54] I have considered whether the defence of accident applies in this case. Section 80 of the Penal Code provides as follows:

80. Accident in the doing of a lawful act

Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge, in the doing of a lawful act in a lawful manner, by lawful means, and with proper care and caution.

Illustration

A is at work with a hatchet; the head flies off and kills a man who is standing by. Here, if there was no want of proper caution on the part of A, his act is excusable and not an offence.

[55] However, there is no evidence from the accused to suggest that the defence of accident is available to him. The accused did not say in court that when he pushed the deceased away from him twice, the deceased was stabbed accidentally. In fact, the accused admitted stabbing the deceased to PW5 without justifying that it was an accident. Furthermore if the deceased was stabbed accidentally he would not have suffered to two deep stab wounds measuring 9cm in the area of his heart. In all probability, if it was an accident, the deceased would have suffered only one stab wound.

Conclusion

[56] For all the above reasons, I find that the accused had failed to prove the defence of private defence on a balance of probabilities. He has also failed to prove on a balance of probabilities the existence of circumstances which can bring his case within any of the other general exceptions in Chapter IV the Penal Code or one or more of the special exceptions to s. 300 of the Penal Code. I am also satisfied that his evidence does not raise a doubt on the whole of the case for the prosecution. In the premises, I find him guilty of the charge of murder beyond reasonable doubt. I convict and sentence him to death by being hanged by the neck until he is dead in accordance with s. 277 of the Criminal Procedure Code.

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